Halimah bt Saaod v Azmi bin Che Ros

HIGH COURT (IPOH) — CIVIL SUIT NO 22–86 OF 2000
BALIA YUSOF J
20 AUGUST 2008

Land Law — Transfer — Validity of — Allegation of fraudulent transfer and plea of non est factum — Whether proven — Whether there was exertion of undue influence — Whether failure to call material witness warranted invocation of presumption under s 114(g) of the Evidence Act 1950 — Whether transfer null and void

The plaintiff landowner who was now deceased, had received a notice from Malayan Banking Bhd, dated 8 November 1995, demanding a sum of RM1,906.80 being the amount of arrears owing to the bank with a threat of legal action against her. Desperate of losing her land, which was charged to the said bank, the plaintiff had approached the defendant, her cousin brother, who had agreed to settle the loan on her behalf. The plaintiff had since died and SP1, the daughter of the deceased was substituted as the plaintiff. In her evidence, SP1 stated that she together with the deceased plaintiff, the defendant and the other witness, SD1 had gone to the penghulu's office in Bidor to deal with the land and to get the penghulu to attest the said document. SP1 alleged that she was asked to sign a document in which she was never given a chance to read. The said document was in fact her consent as a beneficiary, for the transfer of the said land from the plaintiff to the defendant. She further alleged that the defendant had fraudulently obtained the plaintiff's thumbprint on Form 14A for the transfer of the land to the defendant and that the land administrator of the Tapah Land Office had witnessed the transaction. The defendant had only informed the plaintiff that the said land had been transferred into his name sometime in March or April 1997. Feeling cheated, three years later, the plaintiff lodged a caveat against the said land, and subsequently initiated the present suit against the defendant. The plaintiff sought, inter alia, for a declaration that she was the beneficial owner of the land and further, a declaration that the defendant who was now the registered owner of the said land was holding the same in trust and that the defendant should be restrained from dealing with the land in whatsoever manner.

Held, dismissing the claim with costs:

(1) SP1 merely suspected that the defendant had fraudulently obtained her signature and the deceased plaintiff's thumbprint and never went any further than that. Mere suspicion and assumption was certainly not sufficient to discharge the burden of proof on the plaintiff's case (see para 12).

(2) A plain denial of any knowledge about the document was not sufficient to invoke the application of the plea of *non est factum*. Considering the circumstances surrounding the signature of the document by SP1, it was inconceivable that SP1 did not know the nature of the document she was signing and coupled with the absence of any evidence of fraud, her evidence was highly improbable. In the same breadth, her evidence on the thumbprint of the plaintiff being fraudulently obtained was equally improbable. Form 14A was thumbprinted at the land office and witnessed by the land administrator, one Abdul Halim bin Hamed. There was not a shred of evidence of fraud against the defendant. Hence, the evidence of SP1 that she and the plaintiff only knew about the transfer of the land to the defendant sometime in March or April 1997 was highly improbable and a figment of imagination (see para 14).

(3) The two witnesses, namely the land administrator and the penghulu who either witnessed or attested the documents relevant to the transfer of the land were not called to testify in court. They were material witnesses who could have enlightened the court on the issue of fraudulent procurement of the signature and thumbprints of the parties in this case. As these witnesses were readily available, the failure of the plaintiff to call them could only lead to one irresistible conclusion that was, if called, they would be unfavourable to the plaintiff's case (see para 22).

[Bahasa Malaysia summary

Tuan tanah plaintif yang kini telah meninggal dunia, telah menerima satu notis daripada Malayan Banking Bhd, bertarikh 8 November 1995, menuntut wang sejumlah RM1,906.80 yang merupakan jumlah tertunggak yang kena dibayar kepada bank dengan ancaman tindakan undang-undang terhadapnya. Terdesak akan kehilangan tanahnya, yang telah dicagarkan kepada bank, plaintif telah menemui defendan, abang sepupunya, yang telah bersetuju untuk menyelesaikan pinjamannya bagi pihaknya. Plaintif kemudiannya meninggal dunia dan SP1, anak perempuan si mati telah diganti sebagai plaintif. Dalam keterangannya, SP1 menyatakan dia bersama si mati plaintif, defendan dan saksi yang lain, SD1 telah pergi ke pejabat penghulu di Bidor untuk menguruskan tanah tersebut dan untuk

mendapatkan penghulu mengesahkan dokumen berkenaan. SP1 mendakwa beliau diminta menandatangani satu dokumen yang mana dia tidak diberi peluang untuk membacanya. Dokumen berkenaan adalah sebenarnya persetujuan dia sebagai benefisiari, bagi pindah milik tanah dari plaintif kepada defendan. Dia seterusnya mendakwa bahawa defendan telah secara fraud memperolehi cap jarinya di Borang 14A untuk pindah milik tanah kepada defendan dan bahawa pentadbir tanah Pejabat Tanah Bidor telah menyaksikan transaksi tersebut. Defendan hanya memberitahu plaintif bahawa tanah tersebut telah ditukarkan kepada namanya sekitar Mac atau April 1997. Merasa ditipu, tiga tahun kemudian, plaintif telah memasukkan kaveat terhadap tanah tersebut, dan kemudiannya memulakan guaman ini terhadap defendan. Plaintif memohon, antara lain, untuk satu deklarasi yang beliau adalah pemilik benefisial tanah tersebut dan seterusnya, satu deklarasi bahawa defendan yang kini adalah pemilik berdaftar tanah tersebut adalah memegangnya dalam amanah dan bahawa defendan mesti dihalang dari berurusan dengan tanah tersebut dalam apa jua cara.

Diputuskan, menolak tuntutan dengan kos:

(1) SP1 hanya mengesyaki bahawa defendan telah secara penipuan memperolehi tandatangan beliau dan cap jari si mati plaintif dan tidak lebih dari itu. Syak dan andaian semata-mata adalah tentunya tidak mencukupi untuk melenyapkan beban pembuktian ke atas kes plaintif (lihat perenggan 12).

(2) Penafian biasa ke atas sebarang pengetahuan mengenai dokumen tersebut adalah tidak mencukupi untuk membangkitkan permohonan rayuan *non est factum*. Mengambilkira keadaan-keadaan berkaitan tandatangan dokumen tersebut oleh SP1, ianya adalah tidak boleh diterima bahawa SP1 tidak mengetahui tentang sifat dokumen yang dia tandatangani dan bersama dengan ketiadaan keterangan mengenai penipuan, keterangan beliau adalah sangat sukar diterima. Dalam hal yang sama, keterangan beliau mengenai cap jari plaintif yang diperolehi secara penipuan adalah sama sukar diterima. Borang 14A telah dicap jari di pejabat tanah dan disaksikan oleh pentadbir tanah, seorang yang bernama Abdul Halim bin Hamed. Tidak terdapat sebarang bukti keterangan mengenai penipuan terhadap defendan. Oleh itu, keterangan SP1 yang dia dan plaintif hanya mengetahui mengenai pindah milik tanah tersebut kepada defendan sekitar Mac atau April 1997 adalah sangat sukar diterima dan satu imaginasi (lihat perenggan 14).

(3) Kedua-dua saksi, iaitu pentadbir tanah dan penghulu yang sama ada telah menyaksikan atau mengakusaksi dokumen-dokumen yang relevan terhadap pindah milik tanah tersebut tidak dipanggil untuk memberi

keterangan di mahkamah. Mereka adalah saksi-saksi utama yang boleh memberitahu mahkamah mengenai isu pemerolehan secara penipuan tandatangan dan cap-cap jari pihak-pihak dalam kes ini. Memandangkan saksi-saksi ini adalah sedia ada, kegagalan plaintif untuk memanggil mereka hanya menjurus kepada satu kesimpulan yang tidak dapat ditahan iaitu, jika dipanggil, mereka akan tidak memihak kepada kes plaintif (lihat perenggan 22).]

Notes

For cases on validity of transfer, see 8(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 4660–4666.

Cases referred to

Adorna Properties Sdn Bhd v Boonsom Boonyanit @ Sun Yok Eng [2001] 1 MLJ 241, FC (refd)

Ang Hiok Seng @ Ang Yeok Seng v Yim Yut Kiu (personal representative of the estate of Chan Weng Sun, deceased) [1997] 2 MLJ 45, FC (refd)

Chu Choon Moi v Ngan Siew Tin [1986] 1 MLJ 34, FC (refd)

Curtis v Chemical Cleaning & Dyeing Co Ltd [1951] 1 All ER 631, CA (refd)

L' Estrange v F Graucob Ltd [1934] 2 KB 394, CA (refd)

Nallammal & Anor v Karuppanan & Anor [1993] 3 MLJ 476, HC (refd)

Rosli bin Darus v Mansor @ Mansur bin Haji Saad [2001] 4 MLJ 206, HC (refd)

Saunders (Executrix of the will of Rose Maud Gallie, deceased) v Anglia Budding Society [1971] AC 1004, HL (refd)

Tengku Abdullah Ibni Sultan Abu Bakar & Ors v Mohd Latiff bin Shah Mohd and other appeals [1996] 2 MLJ 265, CA (refd)

Thong Kim Chea lwn Thong Seng & Co Sdn Bhd & Satu Lagi [2006] 8 CLJ 677, HC (refd)

Wan Salimah bt Wan Jaafar v Mahmood bin Omar (Anim bt Abdul Aziz, interverner) [1998] 5 MLJ 162, HC (refd)

Yong Tim v Hoo Kok Chong & Anor [2005] 3 CLJ 229, FC (refd)

Legislation referred to

Contracts Act 1950 s 16, 16(2)(b)
Evidence Act 1950 ss 73A, 114(g)
National Land Code Form 14A

KK Yeow (Jason Yeow with him) (Yeow & Co) for the plaintiff.
Ahmad Fariz (Ali & Fariz) for the defendant.

Balia Yusof J:

[1] This is a typical case of a poor kampong folk who claimed to be cheated by her own relative of the only piece of land she ever had. What started as a

request for help, the plaintiff landowner through the manipulations of her so called saviour was made landless and is crying foul. Whether that is the real plot, is yet to be seen. It all started when the plaintiff landowner who is now deceased, received a notice dated 8 November 1995 from Malayan Banking Bhd demanding a sum of RM1,906.80 being the amount of arrears owing to the bank with a threat of legal action against her. Desperate of losing her land, which is charged to the bank, the plaintiff turned to one Hajah Che Nen who is her cousin sister for help. Hajah Che Nen then approached the defendant who is her cousin brother to settle the plaintiff's loan with the bank. The plaintiff agreed to the arrangement and the loan was finally settled by the defendant on behalf of the plaintiff. Both the plaintiff and the defendant together with Hajah Che Nen went to the bank to settle the matter. This took place in 1995. Subsequently, according to the evidence of SP1, sometime in March or April 1997 the defendant informed the plaintiff that the land has been transferred to his name. Feeling cheated, three years later, the plaintiff lodged a caveat against the said land on 4 January 2000, and took out the present suit against the defendant in March the same year. Enumerated below are the reliefs sought by the plaintiff against the defendant:

(1) Satu deklarasi bahawa memorandum pindah milik tanah QT(M) 175 Lot 6020, Mukim Bidor, Daerah Batang Padang Negeri Perak dari plaintif ke defendan adalah tak sah;

(2) satu deklarasi bahawa plaintif adalah pemilik benefisial bagi tanah QT(M) 175 Lot 6020, Mukim Bidor, Daerah Batang Padang, Negeri Perak;

(3) satu deklarasi bahawa defendan adalah pemegang amanah mengenai tanah QT(M) 175 Lot 6020, Mukim Bidor, Daerah Batang Padang, Negeri Perak bagi faedah plaintif;

(4) satu injunksi bahawa defendan dihalang daripada menguruskan tanah QT(M) 175 Lot 6020, Mukim Bidor, Daerah Batang Padang, Negeri Perak dengan apa cara jua pun tanpa kebenaran secara bertulis dari plaintif;

(5) defendan memindah milik tanah QT(M) 175 Lot 6020, Mukim Bidor, Daerah Batang Padang, Negeri Perak kepada plaintif atau seorang namaan (nominee) plaintif dan segala perbelanjaan pindah milik ditanggung oleh defendan;

(6) satu perintah bahawa penolong kanan pendaftar mahkamah ini menandatangani suratcara pindah milik dan segala dokumen-dokumen sampingan untuk memindah milik tanah tersebut kepada plaintif sekiranya defendan enggan menandatangan suratcara dan dokumen-dokumen yang berkenaan itu;

(7) secara alternatifnya satu perintah yang menyatakan tanah QT(M) 175, Lot 6020, Mukim Bidor, Daerah Batang, Negeri Perak dijual dengan harga yang diluluskan oleh plaintif kepada seorang pembeli yang diluluskan oleh plaintif;

(8) satu perintah bahawa plaintif dibenarkan melantik suatu firma peguamcara untuk bertindak bagi defendan sebagai penjual dan plaintif dibenarkan menerima segala wang jualan ke atas penjualan (proceeds of sale) ke atas penjualan tanah QT(M) 175, Lot 6020 Mukim Bidor, Daerah Batang Padang Negeri Perak;

(9) ganti rugi;

(10) kos tindakan ini ditanggung oleh defendan; dan

(11) lain-lain perintah yang difikirkan adil dan suaimanfaat oleh mahkamah.

[2] The plaintiff has since died and Zakiah bt Tooid (SP1) was substituted as the plaintiff. The evidence of SP1 with regard to the land transaction is simply that her mother (the deceased plaintiff, hereinafter still referred to as the plaintiff) wanted to borrow money from Hajah Che Nen but later agreed with the defendant. According to SP1 it was agreed between the plaintiff, the defendant and Hajah Che Nen that the land would be sold the soonest possible in order to settle the loan of the plaintiff with the bank and the plaintiff has never agreed to transfer the land to the defendant. Enclosure 27 is an agreed bundle of document containing among others the following documents:

(1) Borang 14A Kanun Tanah Negara (pp 8–11).

(2) Borang Permohonan Untuk Mendapatkan Kebenaran YAB Menteri Besar Perak untuk memindah milik tanah (pp 38–41).

[3] In her evidence, SP1 stated that the second time the defendant came to her mother's house was in March or April 1996 and it was during this time that she together with the plaintiff, brought the defendant to see the Penghulu of Bidor where she was asked to sign a document which she said she did not know and was never given a chance to read it. The document is at p 41 of encl 27 which is her consent as a beneficiary, for the transfer of the said land from the plaintiff to the defendant. SP1 stated that her signature on p 41 of encl 27 was obtained by fraud but did not elaborate any further as to how the fraud was committed by the defendant besides saying that she suspected the defendant had informed the penghulu that her signature on p 41 was given by her freely.

A **[4]** The document at p 38 of encl 27 is an application by the plaintiff for the consent of the Menteri Besar of Perak to transfer the subject land to the defendant. SP1 confirmed in her evidence that the thumbprint therein is that of the plaintiff's and was done in the presence of the Penghulu of Bidor. From the evidence as tendered by SP1 it is without doubt that both the documents
B at pp 38 and 41 of encl 27 were executed before the Penghulu of Bidor.

[5] On the fraud purportedly committed by the defendant, SP1 merely said that on 7 June 1996, together with the defendant, the plaintiff, Hajah Che Nen and the defendant's wife they went to see the Penghulu of Bidor. While
C waiting outside the penghulu's room, the defendant asked the plaintiff to follow him. SP1 did not know where the plaintiff was taken to but suspected the defendant took the plaintiff to see the penghulu and obtained her thumbprint and further stated that she did not know how the defendant managed to get the penghulu to witness the plaintiff thumb printing the
D document. SP1 stated further that she does not know how her signature was obtained by the defendant for the consent to transfer the land to the defendant.

E **[6]** As to the transfer of the land in Form 14A of the National Land Code, SP1 stated that on 14 November 1996 the defendant came over to the plaintiff's house and the plaintiff followed him to the Tapah Land Office upon being told by the defendant that some problem has cropped up relating to quit rent on the said land. SP1 stated in her evidence that she believes the
F defendant managed to get the plaintiff to thumbprint the transfer form and obtained the signature of the pentadbir tanah as witness to the transaction fraudulently. She also believed that the plaintiff did not know the nature and content of the documents so thumbprinted.

G **[7]** The evidence of SP2 is that, sometime in 1997 he made an offer to buy the said land from the plaintiff but was told by the plaintiff to liaise with the defendant who was living in Sg Petani. There was a negotiation between SP2 and the defendant but it broke down and the sale and purchase never materialised.

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[8] SP3 a lawyer, gave evidence to the effect that the plaintiff made the Surat Akuan in exh P1 and she attested the document. In exh P1 the plaintiff declared that she wanted to borrow money from Hajah Che Nen but later agreed with the defendant. She was told by the defendant that she was
I supposed to pay him back RM15,000 and find a buyer for the land. She further declared that in 1997 she realised her land has been transferred to the defendant and there was a buyer who was willing to purchase the land for RM100,000. The defendant however refused to sell it. By such refusal she believes that the defendant has cheated her and thereupon she lodged a

caveat. She further declared that she never realised that she had executed any document to transfer her land to the defendant. A

[9] The defendant in his evidence stated that he agreed with Hajah Che Nen to assist the plaintiff because the plaintiff had agreed to transfer the land to Hajah Che Nen. Hajah Che Nen was not able to settle the plaintiff's debt with the bank on her own and requested him to help her and in consideration of that, the plaintiff agreed to transfer the land to him. According to the defendant, the plaintiff agreed to do so on the understanding that she would still be able to stay on the said land even if it is transferred to the defendant who is related to her. B C

[10] On the land transfer, the defendant stated that together with Hajah Che Nen, the plaintiff, SP1 and SD2, they went to the land office at Tapah for the transfer of the land but was told that the consent for such transfer need to be obtained and executed before the penghulu. Pages 38 and 41 of encl 27 are the documents referred to. The application form at p 38 was thumbprinted by the plaintiff while the consent at p 41 was signed by SP1. According to the defendant, SP1 signed the document in the presence of the Penghulu Bidor and upon being queried by the same. On 15 November 1996 the defendant together with the plaintiff and Hajah Che Nen went to the Tapah Land Office again and both the plaintiff and the defendant appeared before the pentadbir tanah, one Abdul Halim bin Hamed where the plaintiff put her thumbprint on the Form 14A for the transfer of the land to the defendant. D E F

[11] The evidence of SD2 who is the brother in law of the defendant supports the evidence of the defendant as to what took place when they went to see the penghulu Bidor. Upon reaching the penghulu's office, they waited for the penghulu and upon his arrival, SD2 together with the defendant, the plaintiff and SP1 went into the penghulu's room. SD2 left shortly thereafter and waited outside leaving the defendant, the plaintiff and SP1 with the penghulu. According to SD2 after waiting for sometime the defendant together with the plaintiff and SP1 came out of the penghulu's office and they went back to the plaintiff's house in Tapah. SP1, according to SD2 never left the penghulu's room while they were there. SP1 went in and came out of the penghulu's room together with the defendant and the plaintiff. G H

[12] Having set out the evidence as presented in court, I shall now consider the law relating to the plaintiff's claim against the defendant. Apart from seeking for a declaration that she is the beneficial owner of the land, the plaintiff is also seeking a declaration that the defendant who is the registered owner of the said land now is holding the same in trust and that the defendant should be restrained from dealing with the land in whatsoever I

manner. In so applying, the plaintiff has alleged fraud against the defendant and in the same breadth has also pleaded the doctrine of *non est factum*. Sad to say, I am not able to bring myself into agreement with the plaintiff's contention both on the issue of fraud and the plea of *non est factum*. It is trite that the burden lies on the plaintiff to prove fraud beyond reasonable doubt, (see *Yong Tim v Hoo Kok Chong & Anor* [2005] 3 CLJ 229; *Ang Hiok Seng @ Ang Yeok Seng v Yim Yut Kiu (personal representative of the estate of Chan Weng Sun, deceased)* [1997] 2 MLJ 45; *Adorna Properties Sdn Bhd v Boonsom Boonyanit @ Sun Yok Eng* [2001] 1 MLJ 241; *Chu Choon Moi v Ngan Siew Tin* [1986] 1 MLJ 34). Having perused the evidence adduced by the plaintiff's witnesses, the plaintiff fell far too short in meeting the standard of proof required of her. There is no evidence of fraud at all. At the most, SP1 merely suspected that the defendant fraudulently obtained her signature and the deceased plaintiff's thumbprint and never went any further than that. That is not sufficient to discharge the burden of proof as required by law. Suspicion, however strong cannot substitute for evidence.

[13] On the plea of *non est factum*, suffice it to state that such plea is only available if the mistake was as to the very nature of the transaction. If a party had been misled into executing a deed or signing a document which is essentially different from that which he intended to execute or sign, such a plea would be available to him. It is also trite that when a party signs a contract which governs the relations between them, to use the words of Denning J (as he then was) in *Curtis v Chemical Cleaning & Dyeing Co Ltd* [1951] 1 All ER 631, his signature is irrefragable evidence of his assent to the whole contract, including the exempting clauses, unless the signature is shown to be obtained by fraud or mispresentation. Again, a party signing a document in the absence of fraud is bound by it, and it is wholly immaterial whether he has read the document or not (see *L' Estrange v F Graucob Ltd* [1934] 2 KB 394, *Wan Salimah bt Wan Jaafar v Mahmood bin Omar (Anim bt Abdul Aziz, interverner)* [1998] 5 MLJ 162, *Nallamal & Anor v Karuppanan & Anor* [1993] 3 MLJ 476).

[14] I pause here to sieve through the evidence justifying the plea of *non est factum* and I find none. As for SP1, her only evidence as to her signature on the consent to transfer the land is that she was not given the chance to read what the document she was signing. At the time of signing it, SP1 was 25 years old and she is not an illiterate woman and she certainly does not appear to be so when she appeared and gave evidence before me. She works in a factory and definitely can read and write. In any event, looking at the document itself as shown at p 41 of encl 27, it is not a thick or voluminous document but just a one page document which barely contains much details and with the words 'SURAT PERSETUJUAN WARIS / WARIS-WARIS' as a caption. The document further states 'Ditandatangani di hadapan saksi',

the penghulu Mukim Bidor. The evidence also clearly shows that SP1 together with the plaintiff, the defendant and the other witness, SD1 went to the penghulu's office in Bidor to deal with the land and to get the penghulu to attest the said document. The evidence of SD2 confirmed that SP1 and the defendant went into the penghulu's room on the day in question to obtain the penghulu's signature as a witness in connection with the transfer of the land. She can not therefore now say that she does not know what the document she signed was all about. The House of Lords in *Saunders v Anglia Budding Society* [1971] AC 1004 stated that the plea of *non est factum* was available so long as the person signing the document had made a fundamental mistake as to the character or effect of the document. In that case, it appears that Their Lordships considered the disparity between the effect of the document actually signed by the party and the document as it was believed to be. In so considering, Their Lordships held that the disparity must be radical, essential, fundamental or very substantial. A plain denial of any knowledge about the document is not sufficient to invoke the application of this plea. I have considered the circumstances surrounding the signature of the document by SP1 and I find it to be inconceivable that SP1 does not know the nature of the document she was signing and coupled with the absence of any evidence of fraud, I find her evidence to be highly improbable. In the same breadth, I also find that her evidence on the thumbprint of the plaintiff being fraudulently obtained to be equally improbable. The From 14A was thumbprinted at the land office and witnessed by the pentadbir tanah one Abdul Halim bin Hamed. There is not a shred of evidence of fraud against the defendant. SP1 merely stated that she believed the plaintiff's thumbprint was fraudulently obtained at the land office on 15 November 2006, the day the Form 14A was executed and she further stated that she believed the plaintiff did not know the nature and content of the document. Mere suspicion and assumption is certainly not sufficient to discharge the burden of proof on the plaintiff's case. I also find the evidence of SP1 that she and the plaintiff only knew about the transfer of the land to the defendant sometime in March or April 1997 to be highly improbable and a figment of imagination.

[15] I find there is nothing spectacular about the defendant's evidence and neither do I find his evidence improbable. The defendant's evidence as to what transpired at the penghulu's office is supported by SD2 who went together to the penghulu's office at Bidor and left shortly thereafter, leaving the plaintiff, the defendant and SP1 with the penghulu in the room to continue with the transaction. It is evident that the parties went to see the penghulu with only one purpose, namely to obtain the penghulu's signature and for the penghulu to bear witness to the parties' consent for the transfer of the land. The Form 14A signed by the defendant and thumbprinted by the plaintiff was witnessed by the pentadbir tanah and I have no reason to doubt the authenticity of the document which is agreed by the parties in this case.

This document corroborates the defendant's evidence as to what transpired at the land office on the execution of the transfer document. It negatives any suggestion of fraud, coercion or misrepresentation against the defendant and in the same token, rules out the plea of *non est factum* on the part of the plaintiff. The relevant part of the document reads as follows:

> Saya Abdul Halim bin Hamed, Pentadbir Tanah Batang Padang dengan ini mengaku bahawa tandatangan/cap ibu jari yang diatas itu telah ditulis/dicapkan di hadapan saya pada 15 haribulan November 1996 dan adalah tandatangan/cap ibu jari yang benar bagi — Halimah bt Saaod kp 0351095 adalah seorang warganegara Malaysia yang telah mengaku kepada saya:
>
> (i) Bahawa ia adalah cukup umur;
>
> (ii) Bahawa ia adalah warganegara Malaysia;
>
> (iii) Bahawa dia telah menyempurnakan suratcara ini dengan kerelaan hatinya sendiri; dan
>
> (iv) Bahawa dia faham akan kandungan serta natijahnya.
>
> Disaksikan dengan tandatangan saya pada 15 haribulan November 1996.
>
> .....
>
> Tandatangan

[16] In my view, the facts stated by the plaintiff in her Surat Akuan (exh P1) must be viewed with great caution. Exhibit P1 is a statutory declaration which was sworn by the plaintiff on 5 January 2000 just before the filing of this suit in March the same year. Exhibit P1 was admitted pursuant to s 73A of the Evidence Act 1950 and the maker is the plaintiff, now deceased. The relevant part of the document which is central to the issue in this case are paras 10 and 11 which state as follows:

> 10. Kepercayaan saya adalah Azmi bin Che Ros telah menipu saya dengan mengambil tanah saya kerana beliau tidak mahu jual tanah tersebut walaupun ada orang yang berminat untuk membeli tanah tersebut dengan harga yang tinggi dan saya ada dinasihati bahawa suatu kaveat dimasukkan ke dalam surat daftar tanah tersebut.
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> 11. Sejak tahun 1995 kesihatan badan saya adalah sangat kurang baik dan penglihatan saya adalah buruk. Saya tidak sedar sama ada saya menandatangani apa-apa surat atau dokumen untuk memindah tanah tersebut kepada Azmi bin Che Ros dan pada segala masa yang material, surat hakmilik tanah saya tidak diserahkan kepada saya oleh Mayban Berhad atau oleh Azmi bin Che Ros.

[17] It is clear from the plaintiff's declaration that she believed that the defendant has cheated her because of the defendant's refusal to sell the land even though there was a buyer who was willing to purchase it at a much higher price and not because the land was fraudulently transferred to the defendant as painted by the evidence of SP1.

[18] As for the transfer of the land itself, the plaintiff declared that she was unaware whether she had signed any letters or document to transfer the said land to the defendant. In assessing the evidential value of exh P1, I have considered the whole facts and circumstances of the case in the light of the evidence adduced by both parties and come to the conclusion that the defendant's evidence on the whole transaction seems to be more probable than that of the plaintiff's. By any stretch of imagination, paras 10 and 11 of the said declaration can never be construed as sufficient evidence of fraud, misrepresentation or coercion against the defendant and also for a plea of *non est factum*. Exhibit P1 does not in anyway bolster the plaintiff's case. The plaintiff's counsel however, during submission withdrew his claim on mispresentation, coercion or duress and relied solely on the issue of fraud.

[19] It was further submitted by counsel that the plaintiff being sickly, helpless and having financial problem was being dominated by the defendant and that the transaction which she entered into was unconscionable. Reliance was placed on s 16 of the Contracts Act 1950 and it was submitted that the contract between the parties here was induced by 'undue influence'. Clearly, from the evidence adduced, the plaintiff was relying in particular on sub-s (2)(b) of the said provision in relation to contracts made with a person whose mental capacity is temporarily or permanently affected by reason of age, illness or mental or bodily stress. It was primarily for this purpose that the medical report of the plaintiff was introduced as evidence and forms part of the agreed bundle of documents in encl 27. The medical report is at p 26A of encl 27. The report is dated 27 December 2001 and addressed to the plaintiff's counsel, Tetuan Yeow & Co and states as below:

Pejabat Rekod Perubatan

Hospital Tapah

Perak Darul Ridzuan.

Ruj. Tuan: YKK/H30/1990 Tarikh: 27 Disember 2001

Ruj. Kami:

Nama dan Alamat Peminta:

Yeow & Co

Peguambela dan Peguamcara

No: 20A, Jalan Medan Ipoh 5

Bandar Baru Medan Ipoh

31400 Ipoh

Perak Darul Ridzuan.

LAPURAN PERUBATAN KE ATAS:

NAMA: HALIMAH BT SAAOD

NO. K/P: 381213-08-5936

UMUR: 61 TAHUN

LAPURAN

61 years old Malay lady.

She was known case of Diabetis Mellitus Ischaemic heart disease and hypertension.

Patient has had multiple admission. We admitted to Hospital Teluk Intan on 21.01.1993 for Diabetis Mellitus with infected Left foot abscess.

Patient had been admitted to Hospital Besar lpoh on 20.9.1995 for Diabetis Ketoacidosis with suspected gastrointestinal bleeding.

Then patient also had several admission since 09.07.1997 for poorly control Diabetis Mellitus symptom. The number of admission was increasing in year 1999 till year 2001.

t.t

[DR. AHMAD FADZIL SUJAK]

Pegawai Perubatan

Hospital Tapah

35000 Tapah.

[20] Beside this medical report, the health condition of the plaintiff at the time of going back and forth to the office of the penghulu and the office of the pentadbir tanah during the transaction was described differently by SP1 and the defendant. While SP1 gave evidence saying that the plaintiff was weak, unable to walk on her own and was of poor sight, the defendant gave a different version, saying that she was normal and able to walk without anybody's assistance. The defendant's evidence was corroborated by SD2 who testified that the plaintiff followed them to the penghulu's office and the office of the Pentadbir Tanah Tapah and was walking together along with SP1 without any assistance. That was in 1995 and 1996. The medical report in encl 27 is dated 27 December 2001 and does not indicate the physical status of the patient and neither does it mention about the patient's sight as well as her mental health. No evidence of whatsoever nature is available for this court to assess the mental capacity of the plaintiff in order to determine whether her

mental capacity is temporarily or permanently affected by reason of age, illness or mental or bodily stress as required by sub-s (2)(b) aforesaid. There is also no supporting evidence as to the fact of her being of very poor sight as alleged by SP1. Considering the evidence in its totality, although I find that the plaintiff was not in the best of health, I still do not find that the plaintiff has satisfied the proof as required under that provision.

[21] In the circumstances, it is my finding that there was no impairment on the plaintiff's mental capacity that merits the invocation of the aforesaid provision of the law. While accepting that the doctrine of undue influence like all other equitable doctrines is a flexible one and the categories in which it may operate is not closed, I am not satisfied that the facts and circumstances of the instant case can be brought within the ambit of s 16 of the Contracts Act 1950. It is also my finding that there is no evidence that the defendant is in a position to dominate the will of the plaintiff and using that dominant position to obtain an unfair advantage over her (see *Tengku Abdullah Ibni Sultan Abu Bakar & Ors v Mohd Latiff bin Shah Mohd and other appeals* [1996] 2 MLJ 265; *Thong Kim Chea lwn Thong Seng & Co Sdn Bhd & Satu Lagi* [2006] 8 CLJ 677; *Rosli bin Darus v Mansor @ Mansur bin Haji Saad* [2001] 4 MLJ 206).

[22] Last, but certainly not the least, I must advert to the submission of the defendant's counsel on the application of s 114(g) of the Evidence Act 1950. It is contended that two witnesses, namely the pentadbir tanah and the penghulu are material witnesses for the plaintiff's case on the allegation of fraud against the defendant. As alleged by the plaintiff, these were the two people who either witnessed or attested the documents relevant for the transfer of the land. The signature of SP1 and the thumb prints of the plaintiff were made before these two persons and yet the plaintiff did not deem it fit to call them as witnesses. I am in full agreement with the defendant's contention that these two witnesses are material witnesses who could enlighten this court on the issue of fraudulent procurement of the signature and thumb prints of the parties in this case. These witnesses are readily available and the failure of the plaintiff to call them could only lead to one irresistible conclusion that is, if called, they would be unfavorable to the plaintiff. For the record, a writ of subpoena at testificandum on Abdul Halim bin Hamed, the Pentadbir Tanah Daerah Batang Padang, Tapah was issued way back on 19 August 2003. The presumption under s 114(g) of the Evidence Act 1950 is thus invoked.

[23] Having considered the totality of the evidence before me, I have no hesitation in dismissing the plaintiff's claim against the defendant with costs. Incidentally, in the course of the hearing, the plaintiff's counsel had the

A amended statement of claim while the defendant has decided not to pursue his counterclaim against the plaintiff. Such withdrawals are allowed and I make no further order on that.

Plaintiff's claim dismissed with costs.

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Reported by Ashgar Ali Ali Mohamed

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